UVARAJAH KANASEVAN & ANOR.

v.

PENOLONG PENGARAH BURUH, BUTTERWORTH & ORS.

SUPREME COURT, KUALA LUMPUR
HARUN HASHIM SCJ
MOHD. AZMI SCJ
EDGAR JOSEPH JR SCJ
[CIVIL APPEAL NO. 01-28-1991]
15 MAY 1992

LABOUR LAW: *Complaint filed with Labour Office for non-payment of wages and overtime work - Labour officer proceeded to conduct inquiry under s. 69 Employment Act 1955 - Evidence and part of submissions were heard and adjourned for continuation - Subsequently Labour Officer cancelled hearing of both cases and requested parties to take complaint to Industrial Court - Terms of employment governed by collective agreement - Whether Director General of Labour has jurisdiction to inquire and decide any dispute involving wages or any other payment in cash contained in collective agreement - Distinction between "a contract of service" and "terms of employment" expressed in collective agreement.*

This was an appeal by the appellants' employees of the 2nd and 3rd respondents against the dismissal of their application by the High Court, Penang for an order of *certiorari* to quash the decision of the Labour Officer at Butterworth and for an order of *mandamus* to direct the Labour Office to hear and determine their complaint for non-payment of overtime wages due under the collective agreement.

The main issue in this appeal was whether the Director General of Labour has jurisdiction under s. 69 of the Employment Act 1955 to inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee where the terms of employment are governed by a collective agreement.

Held:

[1] The amendment to s. 69(3) of the Employment Act 1955 on 10 February 1989 has now conferred power on the Director General of Labour to question the validity of a dismissal without notice for misconduct under s. 14(1)(a) of the Act of an employee by his employer.

[2] Section 69A of the Employment Act 1955 clearly illustrates that the jurisdiction of the Director General of Labour under s. 69 of the Act has not been excluded merely because the wages of a complaining employee are provided for in a collective agreement. Indeed the Director General of Labour under s. 69 of the Act must necessarily interpret and enforce the terms of the collective agreement when deciding on a complaint and making an order thereunder.

[3] Section 69A of the Act seeks to avoid duplicity of proceedings and the only exclusion of the Director-General's powers under s. 69 *vis-a-vis* the Industrial Court is if the claim or dispute has been referred to or pending before the Industrial Court. It follows that the decision in *Securicor Malaysia* was wrong in law.

[4] The appeal was allowed, the order of the High Court set aside, the order of the Labour Officer quashed and both the Labour cases were remitted back to the Labour Officer for him to complete the inquiry and to make a decision according to law.

[Appeal allowed. Order of Labour Officer quashed. Case remitted back to Labour Officer to complete inquiry and make a decision according to law.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG BURUH: *Aduan dibuat di Pejabat Buruh kerana tiada pembayaran gaji dan kerja lebih masa - Pegawai Pejabat Buruh telah menjalankan siasatan dibawah s. 69 Akta Pekerjaan 1955 - Keterangan dan sebahagian dari hujah-hujah didengar dan ditangguhkan untuk sambungan - Kemudiannya Pegawai Pejabat Buruh membatalkan pendengaran kedua-dua kes dan meminta pihak-pihak berkenaan supaya mengemukakan aduan kepada Mahkamah Perusahaan - Syarat-syarat pekerjaan bergantung kepada perjanjian kolektif - samada Pengarah Buruh Negara mempunyai bidangkuasa untuk menyiasat dan memutuskan sebarang pertikaian yang melibatkan gaji atau apa-apa pembayaran lain secara tunai yang dinyatakan didalam perjanjian kolektif - Perbezaan diantara "kontrak perkhidmatan" dan "syarat-syarat pekerjaan" yang dinyatakan didalam perjanjian kolektif.*

Ini adalah rayuan oleh perayu, pekerja responden kedua dan ketiga, terhadap penolakan permohonan mereka oleh Mahkamah Tinggi Pulau Pinang untuk satu perintah *certiorari* untuk membatalkan keputusan Pejabat Buruh di Butterworth dan untuk satu perintah *mandamus* untuk mengarahkan Pegawai Pejabat Buruh untuk mendengar dan menentukan aduan mereka mengenai ketidak-pembayaran gaji lebih masa dibawah perjanjian kolektif.

Isu utama didalam rayuan ini ialah samada Pengarah Buruh Negara mempunyai bidangkuasa dibawah s. 69 Akta Pekerjaan 1956 untuk menyiasat dan memutuskan sebarang pertikaian antara pekerja dan majikannya dalam hal yang berkaitan dengan gaji atau lain-lain bayaran secara tunai yang genap masa (harus dibayar) kepada pekerja berkenaan dimana syarat-syarat pekerjaan adalah tertakluk kepada perjanjian kolektif.

Diputuskan:
[1] Pindaan kepada s. 69(3) Akta Pekerjaan 1955, pada 10 Februari 1989 telah sekarang memberi kuasa kepada Pengarah Buruh Negara untuk mempersoalkan kesahihan pembuangan tanpa notis untuk salahlaku dibawah s. 14(1)(a) Akta Pekerjaan terhadap seseorang pekerja oleh majikannya.

[2] Seksyen 69A Akta Pekerjaan 1955, dengan jelas menunjukkan yang bidang kuasa Pengarah Buruh negara dibawah s. 69 Akta berkenaan tidak ketepikan semata-mata kerana gaji seorang pekerja yang kolektif telah dinyatakan didalam perjanjian kolektif. Sebaliknya Ketua Pengarah Buruh dibawah s. 69 Akta berkenaan mesti mentafsirkan dan menguatkuasa terma-terma perjanjian kolektif bila memutuskan aduan dan membuat perintah yang sesuai.

[3] Seksyen 69A Akta berkenaan cuba untuk mengelakkan kependuaan prosiding dan satu-satunya pengecualian kuasa Ketua Pengarah Buruh dibawah s. 69 *vis-a-vis* Mahkamah Perusahaan adalah sekiranya tuntutan atau pertikaian telah dirujukkan kepada atau sementara menentukan keputusan Mahkamah Perusahaan. Dengan ini keputusan didalam *Securicor Malaysia* adalah salah disisi undang-undang.

[4] Rayuan ini dibenarkan, perintah Mahkamah Tinggi diketepikan, perintah Pegawai Pejabat Buruh dibatalkan dan kedua-dua kes buruh diremitkan kembali kepada Pegawai Pejabat Buruh bagi membolehkannya menyempurnakan penyiasatan dan membuat keputusan disisi undang-undang.

[Rayuan dibenarkan. Perintah Pegawai Pejabat Buruh dibatalkan. Kes diremitkan kembali kepada Pegawai Pejabat Buruh untuk menyempurnakan siasatan dan membuat keputusan disisi undang-undang.]

Cases referred to:
Securicor Malaysia Sdn. Bhd. Johor Bahru v. Mohd. Lazi b. Katan [1990] 2 ILR 137 ***(cit)***
Nylex (M) Sdn. Bhd. v. Alias b. Chek [1985] CLJ (Rep) 602 ***(cit)***
Rajaretnam a/l Palaniandy v. Amalgamated Properties & Industries [1988] 2 MLJ 363 ***(foll)***
Asia Motor (K.L.) Sdn. Bhd. v. Ram Raj & Anor. [1985] 2 MLJ 203 ***(foll)***

Legislation referred to:
Employment Act 1955, ss. 2, 3(3), 14, 14(1), (a), (c), 69, 69(1), (3), 69A
Industrial Relations Act 1967 ss. 14(2), 16, 17(1)(b), 33, 56

Other sources referred to:
Industrial Disputes Law in Malaysia, C. P. Mills, 2nd Edn., p. 55

For the appellants - Mohideen Abdul Kader; M/s. Mohideen & Asamaley
For the 1st respondent - Lim Heng Seng, Attorney-General's Chambers
For the 2nd & 3rd respondents - T.M. Varughese; M/s. T.M. Varughese & Co.

[Editors. Note: The decision of the High Court was reported in [1991] 4 CLJ (Rep) 179.]

JUDGMENT

Harun Hashim SCJ:

On 6 October 1986 Uvarajah a/l Kanasevan @ Kanagasabai and 40 other employees of Palmex Industries Sdn. Bhd. filed a complaint with the Labour Office at Butterworth that they had not been paid wages for overtime work from 1 January 1980 to 30 June 1986 amounting to RM86,154.85: Labour Case KB 219/86.

On 12 December 1987 Raja Azman bin Raja Mohd. and 41 other employees of Palmco Oil Mill Sdn. Bhd. filed a complaint with the Labour Office at Butterworth that they had not been paid wages for overtime work from 1 January 1980 to 30 June 1986 amounting to RM108,838.65 : Labour Case KB 222/87.

A Senior Labour Officer proceeded to conduct the inquiry under s. 69 of the Employment Act, 1955 in Case KB 219/86 on 27 November 1986 and in case KB 222/87 on 28 April 1988. With the consent of the parties, the two cases were consolidated and heard together on 14 June 1988. By 21 February 1989 the Senior Labour Officer had heard all the evidence and part of the submissions of Counsel. He adjourned it for continuation on 5 October 1989. By letter dated 21 August 1989 addressed to the solicitors of both parties, the Senior Labour Officer said he was cancelling the hearing of both cases with effect from the date of the letter and requested the parties to take the complaints to the Industrial Court, if the parties so desired. He said he made this decision based on the decision of the High Court at Johor Bahru in *Securicor Malaysia Sdn. Bhd. Johor Bahru v. Mohd. Lazi bin Katan* [1990] 2 ILR 137. The complainants being dissatisfied with the decision of the Senior Labour Officer applied to the High Court at Penang for an order of *certiorari* to remove to that Court for the said decision to be quashed and for an order of *mandamus* to direct the Senior Labour Officer to hear and determine the two labour cases. The learned Judicial Commissioner dismissed the application with costs. Hence this appeal.

The main issue in this appeal is whether the Director General of Labour has jurisdiction under s. 69 of the Employment Act 1955 to inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee where the terms of employment are governed by a collective agreement which has been taken cognizance of by the Industrial Court under s. 16 of the Industrial Relations Act 1967 and made binding on the employee under s. 17(1)(b) of the latter Act.

It is common ground that the employees of the two companies are bound at the material time by the collective agreement entered into between the Food Industry Employees Union and Palmex Industries Sdn. Bhd.; Palmco Oil Mills Sdn. Bhd. (including Bulking Installation) Palmco Jaya Sdn. Bhd. (including Bulk Cargo Terminal) on 15 June 1986 effective from 1 July 1984 and extended to 30 June 1990. The collective agreement provides:

> **Article 17 - Overtime**
>
> (a) Overtime is work performed at the prior request of the Company outside the normal working hours applicable to the employees concerned and with the consent of the employee but such consent shall not be unreasonably withheld.
>
> **Article 7 - Arbitration**
>
> Any dispute relating to the interpretation or implementation of this Agreement shall unless settled by negotiation may be referred for arbitration in accordance with provisions of the Industrial Relations Act, 1967 or such other law as may be in force.

It was urged upon us that where the wages and other cash payments of an employee are provided for in a collective agreement, the Director General of Labour has no jurisdiction to inquire into any dispute with respect to such matters under s. 69 of the Employment Act. It is said that by virtue of Article 7 of the collective agreement read with s. 14(2) of the Industrial Relations Act (arbitration clause) any dispute arising out of a collective agreement should:

(a) be referred for interpretation by the Industrial Court under s. 33 of the Industrial Relations Act; or

(b) be the subject matter of a complaint of non-compliance in the Industrial Court under s. 56 of the Industrial Relations Act.

The authority for this proposition is said to be the *Securicor Malaysia Case* (*supra*). In that case, the respondent had been dismissed from service without notice for misconduct under s. 14 of the Employment Act and was claiming :

1. Wages in lieu of notice of termination of service;
2. Termination benefits; and
3. Arrears of pay for the years 1984 & 1985.

The learned Judge there held at p. 139 that the Labour Officer had no jurisdiction to decide on claims (1) & (2) following the case of *Nylex (M) Sdn. Bhd. v. Alias b. Chek* [1985] CLJ (Rep) 602 and affirmed by this Court in *Rajaretnam a/l Palaniandy v. Amalgamated Properties & Industries* [1988] 2 MLJ 363 where it was held:

> that s. 69(1) of the Employment Act 1955 does not give any power to the Director General or Labour Officer of the Ministry of Labour to question the validity of the dismissal of an employee by his employer.

The *Nylex* case was decided on 19 January 1985 and the *Rajaretnam* case on 27 May 1988. In both cases, the issue was whether under s. 69(1) of the Employment Act the Director General of Labour has the power to question the validity of the dismissal of an employee by his employer. At that time subsection (3) of s. 69 was in the following terms:

> In addition to the powers conferred by the provision of subsections (1) & (2) the Director General may inquire into and confirm or set aside any decision made by an employer to down-grade or suspend an employee under s. 14 and the Director General may make such consequential orders as may be necessary to give effect to his decision.

Section 14(1) states ((c) prior to 10 February 1989):

> (1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry -
>
> (a) dismiss without notice the employee; or
>
> (b) down-grade the employee; or
>
> (c) suspend him from work without payment of wages for a period not exceeding one week.

It was pointed out in the *Nylex* case, this subsection purposely left out dismissal without notice for misconduct under s. 14(1)(a). Following the decisions in these two cases, Parliament amended s. 69(3) on 10 February 1989 to read:

> (3) In addition to the powers conferred by subsections (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer under s. 14(1) and the Director General may make such consequential orders as may be necessary to give effect to his decision:
>
> Provided that if the decision of the employer under s. 14(1) is set aside, the consequential order of the Director General against such employer shall be confined to payment of indemnity in lieu of notice and other payments that the employee is entitled to as if no misconduct was committed by the employee:
>
> Provided further that the Director General shall not set aside any decision made by an employer under s. 14(1)(c) if such decision has not resulted in any loss in wages or other payments payable to the employee under his contract of service:
>
> And provided further that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within thirty days from the date on which the decision under s. 14 is communicated to him either orally or in writing by his employer.

The amendment to s. 69(3) has now conferred power on the Director General of Labour to question the validity of a dismissal without notice for misconduct under s. 14(1)(a) of an employee by his employer. In view of the amendment by Parliament, *Nylex* and *Rajaretnam* are now academic on this point.

The *Securicor Malaysia* case was decided on 27 April 1989 and it appears to us that the learned Judge's attention was not drawn to the amendment as otherwise he would not have held at p. 139:

> Following the case of *Nylex (M) Sdn. Bhd. v. Alias bin Chek* (*supra*) and the case of *Rajaretnam a/l Palaniandy v. Amalgamated Properties & Industries* (*supra*) I have no hesitation to say that the Labour Officer has no jurisdiction to decide items 1 & 2 but he in fact decided on item 3 after dismissing items 1 & 2.

With regard to item 3 in respect of the claim for arrears of wages under the collective agreement, the learned Judge held at p. 140:

> the director in hearing the matter and deciding that the employer was liable to pay under Award 50 was usurping the function of the Industrial Court for it is clear to me that the respondent in order to claim must come under either s. 33 (in respect of interpretation of an Award) or s. 56 (complaint of non-compliance with an Award) of the Industrial Relations Act 1967. He would have to go to the Industrial Court for the award he obtained from the Labour Officer.

He followed the appeal and set aside the award of the Director. The question is whether that is a correct statement of the law. Section 69(1) of the Employment Act provides:

> (1) The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under -
>
> (a) any term of the contract of service between such employee and his employer;
>
> (b) any of the provisions of this Act or any subsidiary legislation made thereunder; or
>
> (c) the provisions of the Wages Council Act, 1947 or any order made thereunder,
>
> and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof.

By s. 3(3) of the Employment Act, the power of the Director General may be exercised by:

(a) Deputy Directors General of Labour;

(b) Directors of Labour, Deputy Directors of Labour and Assistant Directors of Labour; and

(c) Labour Officers

in so far as inquiries under s. 69 are concerned. This Court in *Asia Motor (K.L) Sdn. Bhd. v. Ram Raj & Anor*. [1985] 2 MLJ 203 held at p. 206 that a dispute under s. 69(1) of the Employment Act must satisfy three conditions, *viz :*

1. That it is a dispute between an employee and his employer;
2. That it is a dispute to pay wages; and
3. The dispute arose out of any terms in the contract of service between such employee and his employer.

A distinction must be made between a **contract of service** and **terms of employment.**

Section 2 of the Employment Act provides:

> 'contract of service' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

The terms of employment, however, is a separate and distinct agreement which may be expressed in a collective agreement, company regulations or implied by law.

Section 17 of the Industrial Relations Act provides:

> (1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on -

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

(2) As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between the workmen and employers bound by the agreement that the **rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement** unless varied by a subsequent agreement or a decision of the Court.

(Emphasis added)

C.P. Mills in his book "*Industrial Disputes Law in Malaysia*" 2nd Edn. puts it thus at p. 55:

A collective agreement becomes binding on the individual workman only because the terms of the agreement are made implied terms in the **individual contract**.

The collective agreement and the individual contract, as was said in *Len Seng* "must and can co-exist" together. However, the rates of wages to be paid and the conditions of employment to be observed under the individual contract "shall be in accordance with" the collective agreement unless varied by a subsequent collective agreement or decision of the Court.

We are in entire agreement with the comments of the learned author. A contract of service is an agreement between an individual employee and his employer whereas a collective agreement is :

an agreement in writing concluded between an employer or a trade union of employers of the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties:

as defined by s. 2 of the Industrial Relations Act. The final distinction is this : the right to claim wages arises under the contract of service but how much is to be paid is determined by the collective agreement.

The Industrial Court has the power under s. 33 of the Industrial Relations Act to interpret any collective agreement; and the power to order any party to comply with any terms of a collective agreement under s. 56 of the Industrial Relations Act, but the jurisdiction conferred on the Industrial Court under these two sections has not been made to the exclusion of any other Court or tribunal. If the legislature had intended it to be otherwise, it would have said so expressly as it does e.g. in Article 128 of the Federal Constitution : "The Supreme Court shall, to the exclusion of any other Court, have jurisdiction ...".

Again s. 69A of the Employment Act provides:

Notwithstanding s. 69, the Director General shall not inquire into, hear, decide or make any order in respect of any claim, dispute or purported dispute which, in accordance with the Industrial Relations Act 1967 -

(a) has been referred to, or is pending in any proceedings, before, the Industrial Court; or

(b) is pending in any inquiry or any proceedings under this Act.

which clearly illustrates that the jurisdiction of the Director General of Labour under s. 69 has not been excluded merely because the wages of a complaining employee are provided for in a collective agreement. Indeed, the Director General under s. 69 must necessarily interpret and enforce the terms of the collective agreement when deciding on a complaint

and making an order thereunder. What s. 69A seeks to do is to avoid duplicity of proceedings. By the same token we hold that the only exclusion of the Director General's power under s. 69 *vis-a-vis* the Industrial Court is if the claim or dispute has been referred to or pending before the Industrial Court. It follows that the decision in *Securicor Malaysia* is wrong in law.

In the instant case, the learned Judicial Commissioner agreed with the decision in *Securicor Malaysia* and followed it. This was the main ground in his dismissal of the applications for writs of *certiorari* and *mandamus*. There are other grounds but we do not think it is necessary in the circumstances of this case to consider them.

For the reasons we have stated, we allowed the appeal with costs against the 2nd and 3rd respondents, set aside the order of the High Court, quashed the order of the Labour Officer and ordered that Labour Cases KB 219/86 and KB 222/87 be remitted back to the Labour Officer for him to complete the inquiry and make a decision according to law. We made no order of costs against the 1st respondent as the learned Senior Federal Counsel did not support the High Court's finding on the issue of jurisdiction. The deposit to be refunded to the appellants.

Also found at [1992] 3 CLJ 1353